(16)

No. 94-1837

In The

Supreme Court of the United States

October Term, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, FLORIDA INSURANCE COMMISSIONER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association whose members consist of the principal insurance regulatory officials of the 50 states, the District of Columbia, territories and insular possessions of the United States. The NAIC is interested in filing this Brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

Following a request from the Florida Insurance Commissioner, the NAIC Executive Committee, which consists of seventeen insurance commissioners from various regions of the country, voted to file a Brief *Amicus Curiae* in this case, on behalf of the full NAIC membership. The Executive Committee encourages the Court to affirm the decision of the Eleventh Circuit Court of Appeals in *Barnett Bank of Marion County, N.A. v. Tom Gallagher, Fla. Ins. Comm'r*, 43 F.3d 631 (11th Cir. Jan. 30, 1995).

The NAIC emphasizes that the Florida law prohibiting bank subsidiaries and affiliates from transacting insurance in Florida, FLA. STAT. Ch. 626.988, regulates the business of insurance and preempts contrary federal law which allows national banks and their affiliates and subsidiaries to sell insurance in towns with less than five thousand residents. *See*, National Bank Act, 12 U.S.C. § 92 (1864).

State insurance departments began to regulate the business of insurance in 1851. 1851 N.H. Laws, C.1111.

When this Court held that insurance was commerce subject to federal regulation, *United States v. South-Eastern Underwriters' Ass'n*, 322 U.S. 533 (1944), the NAIC encouraged Congress to adopt legislation that would preserve the state insurance regulatory system without defeating federal anti-trust laws. *See*, Appendix to this Brief at App. 7, quoting *1945 NAIC Proc.* 156 at 159, 160. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 (1945), was adopted, based in large part on the NAIC's suggested language. *See*, McFall, *A Calendar of the South-Eastern Underwriters Association Case*, 265 Ins. L.J. 72 *et seq.* (1945). The NAIC is interested in honoring the original purpose of the McCarran-Ferguson Act, by preserving the state insurance regulatory system. Under the McCarran-Ferguson Act, State insurance departments and State legislators are responsible for establishing and enforcing State laws and policies regarding all aspects of the business of insurance. Additionally, State statutes charge individual insurance commissioners with the responsibility of regulating the business of insurance. *See, e.g.*, FLA. STAT. Ch. 624.308.

The NAIC encourages the Court to affirm the decision of the Eleventh Circuit in *Barnett Bank v. Gallagher*, so that the sale of insurance will remain fully within the regulatory scope of authority of individual States, not the federal government. This is consistent with statutory law and common law and is in the best interest of insurance consumers whom State insurance commissioners are charged to protect.

SUMMARY OF THE ARGUMENT

The decision of the Eleventh Circuit in *Barnett Bank v. Gallagher* should be affirmed because the Eleventh Circuit correctly held that Florida law, FLA. STAT. Ch. 626.988, relates to the business of insurance while Section 92 of the National Bank Act does not. This led the Eleventh Circuit to properly conclude that Section 92 was preempted by the Florida law because the McCarran-Ferguson Act requires that State insurance laws are controlling unless a conflicting federal law specifically relates to the business of insurance.

ARGUMENT

I. STATE INSURANCE LAWS TYPICALLY PREEMPT CONTRARY FEDERAL LAWS.

The McCarran-Ferguson Act confirmed that States, not the federal government, are responsible for regulating the business of insurance. The Act states in part: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." McCarran-Ferguson Act, 15 U.S.C. § 1012(a). Accordingly, every State has adopted a comprehensive set of insurance laws and regulations. *See, e.g.*, FLA. STAT. Ch. 624-651. Congress intended that State laws and regulations would primarily control the regulation of the business of insurance. Federal laws control the regulation of the business of insurance only in limited circumstances. This is because the McCarran-Ferguson Act states in part: "No Act of Congress shall be construed to invalidate, impair,

or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . . " McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

A. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE MCCARRAN-FERGUSON ACT CREATES A REVERSE PREEMPTION DOCTRINE THAT FAVORS STATE INSURANCE LAWS.

The Eleventh Circuit found that: "This statutory scheme [the McCarran-Ferguson Act] creates a reverse-preemption doctrine for insurance regulation. That is, a state statute that regulates insurance presumptively preempts a contrary Congressional statute unless the Congressional statute specifically relates to insurance." *Barnett Bank v. Gallagher* at 634. Similarly, the Ninth Circuit has found that the McCarran-Ferguson Act creates an "inverse preemption" which requires that general federal laws do not preempt State insurance laws. *Merchants Home Delivery Serv. v. Reliance Group Holdings*, 50 F.3d 1486 (9th Cir. 1995).

The plain language of the McCarran-Ferguson Act supports the theory of the reverse-preemption, or inverse preemption, doctrine because Congress specified in the Act that States shall regulate the business of insurance unless a particular federal law applies and specifically relates to the business of insurance. McCarran-Ferguson Act, 15 U.S.C. § 1012.

B. LEGISLATIVE HISTORY OF THE MCCARRAN-FERGUSON ACT INDICATES THAT CONGRESS INTENDED TO PRESERVE STATE INSURANCE LAWS.

Legislative history of the McCarran-Ferguson Act indicates that the Act was intended to preserve state insurance laws and regulations. In 1944, this Court held that insurance was commerce subject to federal regulation. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533. Subsequently, Congress adopted the McCarran-Ferguson Act to reaffirm the authority of States to regulate insurance. A House report gives the following account of Congressional intent:

> Inevitable uncertainties which followed the handing down of the decision in the *Southeastern* [sic] *Underwriters Association* case, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.
>
> . . . [The House] committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. H.R. Rep. No. 68, 79th Cong., 1st Sess. 2 (1945).

Historical NAIC accounts provide further evidence that the State insurance commissioners urged Senators McCarran and Ferguson to adopt federal legislation that would allow State insurance laws to remain valid and

honor federal antitrust laws at the same time. In 1945, the insurance commissioners reported to their colleagues that: "The decision of the United States Supreme Court in the *South-Eastern Underwriters* case confronted Congress, the State Legislatures and the Insurance Commissioners with a problem – the task of preserving State regulation and at the same time not emasculating the federal antitrust laws." Appendix to this Brief at App. 7, quoting 1945 NAIC Proc. 156 at 159, 160.

This Court has similarly found that the purpose of Congress in enacting the McCarran-Ferguson Act was to adopt "legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 at 218 (1979).

C. THE SUPREME COURT PRESUMES CONGRESS DID NOT INTEND TO SUPPLANT STATE LAW.

Furthermore, the Supreme Court has previously explained its presumption in favor of State laws. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, (April 26, 1995), this Court reminded the public that the Supremacy Clause of the U.S. Constitution, Article VI, dictates that federal law may preempt State law expressly, impliedly, or when State and federal laws conflict. *New York Blue Cross v. Travelers* at 1678, *citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203-204 (1983) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Despite the Supremacy clause, however,

this Court explained that it reviews charges of federal preemption with "the starting presumption that Congress does not intend to supplant state law." *New York Blue Cross v. Travelers* at 1678. Additionally, in "fields of traditional state regulation" like insurance, this Court has "worked on the 'assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* (citations omitted). This reasoning supports the Eleventh Circuit's theory of a reverse-preemption doctrine for insurance regulation and invalidates the Sixth Circuit's reliance on the Supremacy Clause to hold that a Kentucky law prohibiting banks from acting as insurance agents was preempted by Section 92. *Owensboro Nat'l Bank v. Don W. Stephens, Comm'r, Dep't of Ins., Commonwealth of Ky.*, 44 F.3d 388 (6th Cir. Dec. 29, 1994).

II. UNDER THE MCCARRAN-FERGUSON ACT, FLORIDA LAW IS PROTECTED FROM PREEMPTION BY SECTION 92.

The Eleventh Circuit reviewed this Court's interpretations of the "business of insurance" under the McCarran-Ferguson Act beginning with this Court's most recent relevant decision: *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993). The Eleventh Circuit summarized *Fabe* as follows: "In *Fabe*, the Supreme Court held that an Ohio statute that accorded policyholders priority over an insolvent insurance company's other creditors was a law enacted to regulate the business of insurance because it regulated policyholders and their relationship

to the insurance company." *Barnett Bank v. Gallagher* at 635, *citing Fabe* at 2210.

In preemption cases involving state insurance laws, the requirement that a state law focus on the relationship between an insurer and its policyholders is derived from this Court's decision in *S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969). In that case, the Supreme Court considered whether an Arizona law designed to protect insurance company shareholders was spared from federal preemption under the McCarran-Ferguson Act. The Court held in *S.E.C.*:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the "business of insurance" [as used within McCarran-Ferguson]. Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class.
>
> But whatever the exact scope of the statutory term, it is clear where the focus was - it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." *Id.* at 460.

As proven in Section III.B. of this Brief, the Florida law clearly regulates the relationship between policyholders and their insurers. Therefore, under the Court's interpretation of the McCarran-Ferguson Act in *S.E.C.*, the Florida law is protected from preemption by Section 92.

The *Fabe* case also details the Supreme Court's *Pireno* test for determining whether a particular statute involves the "business of insurance." *Fabe* at 2207. In *Pireno*, the Court considered: "First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Fabe* at 2207, *citing, Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). Here, the Florida law satisfies the *Pireno* test because: (1) it regulates the sale of insurance policies which spread policyholder risk; and (2) the Florida law was intended to protect policyholders from potentially abusive bank sales practices; and (3) sale of insurance products is limited by law to licensed insurance entities.

Section 92, however, fails to satisfy the *Pireno* test because it was not intended to protect insurance policyholders; instead, it was intended to provide small-town banks with an additional source of revenue. Letter from Comptroller John Skelton Williams to Sen. Robert L. Owen, reprinted in 53 Cong. Rec. 11001 (1916).

The *Fabe* decision focuses on the issues of whether the State law regulates the policyholder's relationship with its insurer and whether the federal law specifically requires that State law is inapplicable. *Barnett Bank* at 636, *citing Fabe* at 2211. Here Section 92 certainly does not specify that state insurance laws are inapplicable. Therefore, the Eleventh Circuit properly held that Florida law is not preempted by Section 92.

III. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT FLORIDA LAW REGULATES THE BUSINESS OF INSURANCE.

A. THE FLORIDA LAW IS PART OF THE UNFAIR INSURANCE TRADE PRACTICES ACT.

The Florida law disallows bank subsidiaries and affiliates from transacting insurance in Florida. FLA. STAT. Ch. 626.988. This provision provides, in pertinent part:

> (2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution [including any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof] shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency. FLA. STAT. Ch. 626.988(2).

This provision is part of the Unfair Insurance Trade Practices Act in the Florida Insurance Code. The stated purpose of the Unfair Insurance Trade Practices Act is:

> . . . to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in . . . [the McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. FLA. STAT. Ch. 626.951.

The Florida Unfair Insurance Trade Practices Act is based largely on the NAIC model Unfair Trade Practices Act, NAIC Model Laws, Regulations and Guidelines, Vol. IV, pp. 880-1 to 880-13 (1994), reprinted in the Appendix to this Brief at App. 9, which regulates insurance marketing by banks. NAIC model laws are developed by insurance regulators and interested parties in a quasi-legislative process. Many State legislatures subsequently adopt the NAIC model laws in whole, or in part, or with slight modifications as the Florida legislature did with the NAIC model Unfair Trade Practices Act. Every State has an unfair insurance trade practice act or related legislation[1] because such laws are considered important for the protection of policyholders and the proper regulation of the business of insurance, pursuant to the McCarran-Ferguson Act. *See, e.g.* FLA. STAT. Ch. 626.951.

One indication that the Florida law regulates the business of insurance is that the law is part of the Unfair Insurance Trade Practices Act, which obviously relates to insurance. The Eleventh Circuit cautioned, however, that this Court has previously warned against undue reliance on location of a statute as an indication of the statute's purpose. *Barnett Bank v. Gallagher* at 634, *citing, Fabe* at 2210. In the *Fabe* case, this Court said one must inquire whether the statute's aim is to regulate an essential part of the business of insurance and, in particular, the relationship between policyholders and their insurance

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[1] See list of citations to all State unfair insurance trade practices acts in Appendix to this Brief, App. 36 through App. 42.

companies. *Barnett Bank v. Gallagher* at 635, *citing*, *Fabe* at 2212.

B. THE FLORIDA LAW REGULATES THE RELATIONSHIPS BETWEEN POLICYHOLDERS AND THEIR INSURERS.

The Eleventh Circuit relied in part on two lower Florida court interpretations of FLA. STAT. Ch. 626.988. *Barnett Bank v. Gallagher* at 636. Both of the lower court decisions express concern that policyholder relationships with their insurers could be harmed by abusive insurance sales practices of banks. More specifically, the Florida court said: "Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today. . . . " *Glendale Fed. Sav. & Loan Ass'n v. Fla. Dep't of Ins.*, 587 So.2d 534, 536 n.1 and 537 (Fla. 1st Dist. Ct. App. 1991), reh'g denied, 599 So.2d 656 (Fla. 1992). In the second cited Florida case, the court wrote: "The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest." *Prod. Credit Ass'ns of Fla. v. Fla. Dep't of Ins.*, 356 So.2d 31, 32 (Fla. 1st Dist. Ct. App. 1978).

The Eleventh Circuit also cited testimony from the *Barnett* trial which indicated that if banks sell insurance, bank customers might be pressured into purchasing unnecessary insurance and insurance companies might be pressured into assuming unwise insurance risks. This

potential for abuse stems from the "loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured." *Barnett Bank v. Gallagher* at 636. The Eleventh Circuit, like the trial court, found that the Florida law was intended to indirectly provide regulatory protection for policyholders against such marketplace abuse.

As this Court has previously held, "Statutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the 'business of insurance.' " *S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453 at 460 (1969). *See, also*, Section II of this Brief.

IV. SECTION 92 OF THE NATIONAL BANK ACT DOES NOT RELATE TO THE BUSINESS OF INSURANCE.

Section 92 of the National Bank Act provides that national banks located in towns with less than five thousand residents may solicit, sell, and collect premiums on insurance products. Additionally, Section 92 provides that bank employees acting as insurance agents may receive fees or commissions for such sales. 12 U.S.C. § 92.

Barnett Bank erroneously argues that Section 92 preempts the Florida law because Section 92 specifically relates to the business of insurance and that under the McCarran-Ferguson Act, Section 92 invalidates the Florida law. However, as the Eleventh Circuit pointed out, the National Bank Act, 12 U.S.C. §§ 21-216d (1864), concerns banking, not insurance. The Eleventh Circuit properly relied on this Court's finding that Section 92 was adopted

"at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Barnett Bank v. Gallagher* at 637, *citing, Fabe* at 2212. When Section 92 was adopted, *Paul v. Virginia*, 75 U.S. 168 (1868) was controlling and was understood by Congress to place regulation of insurance outside Congressional power established by the Commerce Clause of the U.S. Constitution, Article I, § 8, cl. 3. Therefore, Congress could not have intended Section 92 to relate to the business of insurance. Instead Congress enacted Section 92 to regulate certain activities of national banks and that is exactly what it does.

CONCLUSION

The Eleventh Circuit properly held that FLA. STAT. Ch. 626.988 remains valid law. This law prohibiting banks from transacting insurance in Florida is not preempted by Section 92 of the National Bank Act which allows national banks to sell insurance in small towns. Instead, the McCarran-Ferguson Act protects the Florida insurance law from preemption. For these and all the other reasons detailed in this Brief, the National Association of Insurance Commissioners respectfully requests that the Court affirm the decision of the Eleventh Circuit in *Barnett Bank*

of Marion County, N.A. v. Tom Gallagher, Fla. Ins. Comm'r, 43 F.3d 631 (11th Cir. Jan. 30, 1995).

Respectfully submitted,

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APPENDIX

1945 NAIC Proceedings

INTERIM REPORT OF THE SUB-COMMITTEE ON FEDERAL LEGISLATION OF THE EXECUTIVE COMMITTEE OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

June 5, 1945

On March 9, 1945, S. 340, the so-called insurance bill, became law when President Roosevelt affixed his signature thereto. . . .

Following the preparation of the Commissioners' legislative proposal with its attached memorandum of explanation in November, 1944, Commissioner Johnson, by direction of the December, 1944 meeting of the National Association of Insurance Commissioners proceeded to Washington accompanied by Commissioner Harrington, Chairman of the Sub-committee on Federal Legislation. A series of conferences was held with members of Congress, the Attorney General and representatives of the insurance business.

At the time the 78th Congress was drawing to a close. It was the consensus of opinion that immediate legislative relief was required because existing state regulatory and taxing statutes were being questioned and in some respects challenged. Believing that unanimity of opinion would produce legislation in the 78th Congress, Commissioners Johnson and Harrington, acting for the Commissioners, consented to a compromise draft of the Commissioners' legislative proposal. . . . This measure was introduced on the last day of the session by Senators McCarran and Ferguson. On the same day Senators O'Mahoney and Hatch introduced another bill. . . .

Neither of these measures was acted upon before the termination of the 78th Congress. Commissioners Johnson and Harrington in a letter to Senator O'Mahoney dated December 16, 1944 made plain that the concession was made by the Commissioners for the sole purpose of obtaining legislation during the 78th Congress. . . .

When the 79th Congress convened Commissioners Johnson and Harrington returned to Washington. As a result of further conferences and because of the press of time a new compromise measure was drafted which likewise departed in some respects from the text of the original Commissioners' proposal. It was transmitted by the Commissioners to the Honorable Pat McCarran, Chairman of the Senate Judiciary Committee of the Senate. . . . Although their names do not appear on the letter of transmittal the National Fraternal Congress and the Accident and Health Underwriters Conference also endorsed the bill in telegrams subsequently sent to Chairman McCarran. This bill was introduced by Senators McCarran and Ferguson and became the original S. 340. It was amended in committee and reported favorably by the committee on January 24, 1945 (see Senate Report No. 20.) The bill was thereafter amended on the floor (see Congressional Record of January 25, 1945.)

Representative Walter introduced a companion measure in the House, known as H.R. 1973. This bill was likewise amended in the House Judiciary Committee and was favorably reported (see House Report No. 68.) On motion of Representative Walter, S. 340, which had been referred by the Senate to the House for concurrence, was amended by striking out all of the bill following the enacting clause and substituting the subject matter of

H.R. 1973 in lieu thereof (see Congressional Record of February 14, 1945.)

Due to the differences in text the bills were referred to a conference committee composed of Senators McCarran, Ferguson and O'Mahoney and Representatives Sumners, Walter and Hancock. The conference committee report is dated February 22, 1945 and will be found as House Report No. 213. The conference committee report was adopted by both Houses without debate in the House and with debate in the Senate (see Congressional Records of February 26 and 27, 1945.)

COMPARISON OF THE VARIOUS BILLS

A comparison of the bill as it was finally enacted with the text of the original Commissioner's proposal of November, 1944, as well as reference to the Congressional debates, establishes clearly that the Commissioners' draft was used as a foundation for the bill. In drafting the bill Congress used almost verbatim those portions of the Commissioners' proposal relating to the doctrine of Congressional silence and the affirmative expression of the Congressional will in so far as they affect state regulations and taxation. That phase of the Commissioners' proposal constituted one of its major aspects and the incorporation of it in the bill as it was finally adopted is most gratifying.

Likewise, the final draft specifically provides, as did the Commissioners' original text, that the National Labor Relations Act and the Fair Labor Standards Act shall apply to the insurance business.

Those portions of the bill covering the territories to which it is applicable and the separability clause are identical with the text of the Commissioners' original proposal.

In the Commissioners' deliberations preceding the drafting of the Commissioners' legislative proposal and throughout all conferences preceding the enactment of the bill the Commissioners were insistent that even though a moratorium on the application of the anti-trust laws were to be granted, boycotting, coercion and intimidation were to be barred forthwith. Provision was made to that effect in the Commissioners' original text and is embodied in the bill as it finally passed.

The Commissioners' original proposals as to a moratorium on the Sherman and Clayton Acts were also embodied in the law as it was finally enacted with a variation as to the effective date.

So much for the respects in which the Commissioners' proposals were generally adopted. We turn now to the respects in which the final product differed from the proposals originally advanced by the Commissioners.

The Commissioners' draft made no reference to the so-called Merchant Marine Act of 1920. Congress provided that the bill should not affect that law.

The Commissioners asked for complete exemption from the Federal Trade Commission Act. The final bill provides that after the expiration of the moratorium the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by state law." The expression in quotation

marks will be the subject of further comment elsewhere in this report.

The Commissioners also asked for outright exemption from the Robinson-Patman Act. Congress has provided specifically that the Robinson-Patman Act shall not apply to the insurance business up to January 1, 1948. We are uncertain as to the applicability of that act to the business of insurance after that date for the following reason. Part of the Robinson-Patman Act (15 U.S.C.A. 13, 13-a) is part of the Clayton Act (15 U.S.C.A. 12-27). Section 2-b of the bill provides that after January 1, 1948 the Clayton Act shall be applicable to the business of insurance "to the extent that such business is not regulated by state law." Section 3-a of the statute provides that until January 1, 1948 the Robinson-Patman Act shall not apply to the business of insurance or to acts in conduct thereof. The specific mention of the Robinson-Patman Act in Section 3-a suggests, or at least it can be so argued, that Congress intended that after January 1, 1948 that act should apply to the insurance business without limitation of any kind. On the contrary, the provision in Section 2-b that the Clayton Act, of which part of the Robinson-Patman Act is a part, shall be applicable to the business of insurance "to the extent that such business is not regulated by state law," suggests that after January 1, 1948 the Robinson-Patman Act, or at least part of it, shall be in the same category as the Federal Trade Commission Act.

This brings us to a consideration of the Sherman and Clayton Acts. In the Commissioners' original text it was provided that there should be a moratorium on the Sherman and Clayton Acts until July 1, 1948. After that date

the Sherman Act was to apply to the insurance business but certain enumerated cooperative efforts, set forth in section 4-b of the Commissioners' proposal, were to be exempted therefrom. The final exemption applied to concerted action in the field of rate making and contemplated state supervision. In the bill finally adopted by Congress the specific activities enumerated in the Commissioners' proposal were omitted and in lieu thereof Congress provided that the Sherman Act, the Clayton Act and the Federal Trade Commission Act should all be applicable to the business of insurance "to the extent that such business is not regulated by state law." In short, a general provision was substituted for the specific language employed by the Commissioners.

The exact meaning of the expression, "to the extent that such business is not regulated by state law," has been the subject of discussion in the Sub-committee. The debate in the United States Senate following the report of the conference committee indicated differences of opinion as to the effect of the language quoted. Some Senators felt that this language gave those states which enacted legislation on the subject the right to modify and even eliminate the applicability of the Sherman and Clayton and Federal Trade Commission Acts to the business of insurance depending upon the extent of the state legislation enacted. Indeed, it was suggested that this language permitted the states to adopt ineffective legislation or, as one Senator put it, "to go through the form of regulation merely in order to put insurance companies within that state on an island of safety from Congressional regulation." It was argued that the states would not abuse the privilege thus conferred upon them and that if by any

chance they did, Congress could immediately pass additional corrective legislation. On the contrary, it was asserted that the legislation did not contemplate ineffective state regulation. This reasoning was based upon the premise that the word "regulated" as used in the quoted language had a very definite meaning and contemplated not mere permissive action uncontrolled by state authorities but affirmative, effective regulation of the type described by the President in his letter of January 2, 1945, to Senator Radcliffe and emphasized in the President's memorandum made public at the time he signed the bill.

The decision of the United States Supreme Court in the *South-Eastern Underwriters* case confronted Congress, the State Legislatures and the Insurance Commissioners with a problem – the task of preserving state regulation and at the same time not emasculating the federal antitrust laws. The final product does not go as far in some respects as the Commissioners had hoped and goes farther in others, a situation which frequently occurs when compromises must be made. It is apparent, however, that a sincere effort was made to reconcile conflicting views as to the best manner of regulating the insurance business in the public interest.

In so far as this Sub-Committee is concerned our position is clear. We believe in state regulation and this bill recognizes that principle. Under this bill effective state regulation is required if state regulation is to be preserved. The bill presents a challenge to the states. We believe the states can meet that challenge. We restate the fundamental principle to which we have consistently adhered, namely, that the states are under an obligation to provide effective state regulation. Those states whose

statutes are deficient in that respect should immediately address themselves to the task of securing appropriate legislation designed to meet this new development.

Respectfully submitted,

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UNFAIR TRADE PRACTICES ACT

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Prefatory Note: By adopting amendments to this model act in June 1990, the NAIC separated provisions dealing with unfair claims settlement into a newly adopted Unfair Claims Settlement Practices Model Act, to make clearer distinction between general unfair trade practices and more specific unfair claim settlement issues and to focus on market conduct practices and market conduct regulation. By doing so, the NAIC is not recommending that states repeal existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

Section 1. Purpose

The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state that constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. Nothing herein shall be construed to create or imply a private cause of action for a violation of this Act.

Section 2. Definitions

When used in this Act:

A. "Commissioner" means the commissioner of insurance of this state.

Drafting Note: Insert the appropriate term for the chief insurance regulatory official wherever the term "commissioner" appears.

B. "Insured" means the party named on a policy or certificate as the individual with legal rights to the benefits provided by such policy.

C. "Insurer" means any person, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and third-party administrators. Insurer shall also mean medical service plans, hospital service plans, health maintenance organizations, prepaid limited health care service plans, dental, optometric and other similar

health service plans as defined in Sections [insert applicable section]. For purposes of this Act, these foregoing entities shall be deemed to be engaged in the business of insurance.

Drafting Note: Each state may wish to consider the advisability of defining "insurance" for purposes of this Act if its present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient.

D. "Person" means any natural or artificial entity, including but not limited to, individuals, partnerships, associations, trusts or corporations.

E. "Policy" or "certificate" means any contract of insurance, indemnity, medical, health or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any insurer.

F. "Producer" means a person who solicits, negotiates, effects, procures, delivers, renews, continues or binds policies of insurance for risks residing, located or to be performed in this state.

Section 3. Unfair Trade Practices Prohibited

It is an unfair trade practice for any insurer to commit any practice defined in Section 4 of this Act if:

A. It is committed flagrantly and in conscious disregard of this Act or of any rules promulgated hereunder; or

B. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

Section 4. Unfair Trade Practices Defined

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

A. Misrepresentations and False Advertising of Insurance Policies. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement, sales presentation, omission or comparison that:

(1) Misrepresents the benefits, advantages, conditions or terms of any policy; or

(2) Misrepresents the dividends or share of the surplus to be received on any policy; or

(3) Makes a false or misleading statement as to the dividends or share of surplus previously paid on any policy; or

(4) Is misleading or is a misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates; or

(5) Uses any name or title of any policy or class of policies misrepresenting the true nature thereof; or

(6) Is a misrepresentation, including any intentional misquote of premium rate, for the purpose of inducing or tending to induce the purchase, lapse, forfeiture, exchange, conversion or surrender of any policy; or

(7) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any policy; or

(8) Misrepresents any policy as being shares of stock.

B. False Information and Advertising Generally. Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any insurer in the conduct of its insurance business, which is untrue, deceptive or misleading.

C. Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any insurer, and which is calculated to injure such insurer.

D. Boycott, Coercion and Intimidation. Entering into any agreement to commit, or by any concerted action committing any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

E. False Statements and Entries.

(1) Knowingly filing with any supervisory or other public official, or knowingly making,

publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of an insurer.

(2) Knowingly making any false entry of a material fact in any book, report or statement of any insurer or knowingly omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer, or knowingly making any false material statement to any insurance department official.

F. Stock Operations and Advisory Board Contracts. Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to purchase insurance.

G. Unfair Discrimination.

(1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such policy.

(2) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner.

Drafting Note: In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes, this paragraph should be omitted.

(3) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to insure, refusing to renew, cancelling or limiting the amount of insurance coverage on a property or casualty risk solely because of the geographic location of the risk, unless such action is the result of the application of sound underwriting and actuarial principles related to actual or reasonably anticipated loss experience.

(4) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to insure, refusing to renew, cancelling or limiting the amount of insurance coverage on the residential property risk, or the personal property contained therein, solely because of the age of the residential property.

(5) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage

available to an individual because of the sex, marital status, race, religion or national origin of the individual; however, nothing in this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits. Nothing in this section shall prohibit or limit the operation of fraternal benefit societies.

(6) To terminate, or to modify coverage or to refuse to issue or refuse to renew any property or casualty policy solely because the applicant or insured or any employee of either is mentally or physically impaired; provided that this subsection shall not apply to accident and health insurance sold by a casualty insurer and, provided further, that this subsection shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy or contract.

(7) Refusing to insure solely because another insurer has refused to write a policy, or has cancelled or has refused to renew an existing policy in which that person was the named insured. Nothing herein contained shall prevent the termination of an excess insurance policy on account of the failure of the insured to maintain any required underlying insurance.

(8) Violation of the state's rescission laws at [insert reference to appropriate code section].

Drafting Note: A state may wish to include this section if it has existing state laws covering rescission and to insert a reference to a particular code section.

H. Rebates.

(1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance or other insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

(2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:

(a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;

(c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

Drafting Note: Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

I. Prohibited Group Enrollments. No insurer shall offer more than one group policy of insurance through any person unless such person is licensed, at a minimum, as a limited insurance representative. However, this prohibition shall

not apply to employer/employee relationships, nor to any such enrollments.

J. Failure to maintain marketing and performance records. Failure of an insurer to maintain its books, records, documents and other business records in such an order that data regarding complaints, claims, rating, underwriting and marketing are accessible and retrievable for examination by the insurance commissioner. Data for at least the current calendar year and the two (2) preceding years shall be maintained.

K. Failure to Maintain Complaint Handling Procedures. Failure of any insurer to maintain a complete record of all the complaints it received since the date of its last examination under Section [insert applicable section]. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of each complaint, and the time it took to process each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance.

L. Misrepresentation in Insurance Applications. Making false or fraudulent statements or representations on or relative to an application for a policy, for the purpose of obtaining a fee, commission, money or other benefit from any provider or individual person.

M. Unfair Financial Planning Practices. An insurance producer:

(1) Holding himself or herself out, directly or indirectly, to the public as a "financial planner," "investment adviser," "consultant,"

"financial counselor," or any other specialist engaged in the business of giving financial planning or advice relating to investments, insurance, real estate, tax matters or trust and estate matters when such person is in fact engaged only in the sale of policies.

Drafting Note: This provision is not intended to preclude persons who hold some form of formal recognized financial planning or consultant designation from using this designation when they are only selling insurance. This does not permit persons to charge an additional fee for services that are customarily associated with the solicitation, negotiation or servicing of policies.

(2) (a) Engaging in the business of financial planning without disclosing to the client prior to the execution of the agreement provided for in Paragraph 3, or solicitation of the sale of a product or service that

(i) He or she is also an insurance salesperson, and

(ii) That a commission for the sale of an insurance product will be received in addition to a fee for financial planning, if such is the case.

(b) The disclosure requirement under this subsection may be met by including it in any disclosure required by federal or state securities law.

(3) (a) Charging fees other than commissions for financial planning by insurance producer, unless such fees are based

upon a written agreement, signed by the party to be charged in advance of the performance of the services under the agreement. A copy of the agreement must be provided to the party to be charged at the time the agreement is signed by the party.

(i) The services for which the fee is to be charged must be specifically stated in the agreement.

(ii) The amount of the fee to be charged or how it will be determined or calculated must be specifically stated in the agreement.

(iii) The agreement must state that the client is under no obligation to purchase any insurance product through the insurance agent, broker or consultant.

Drafting Note: This subsection is intended to apply only to persons engaged in personal financial planning.

(b) The insurance producer shall retain a copy of the agreement for not less than three (3) years after completion of services, and a copy shall be available to the commissioner upon request.

N. Failure to file or to certify information regarding the endorsement or sale of long-term care insurance. Failure of any insurer to:

(1) File with the insurance department the following material:

(a) The policy and certificate;

(b) A corresponding outline of coverage; and

(c) All advertisements requested by the insurance department; or

(2) Certify annually that the association has complied with the responsibilities for disclosure, advertising, compensation arrangements, or other information required by the commissioner, as set forth by regulation.

O. Failure to Provide Claims History

(1) Loss Information – Property and Casualty. Failure of a company issuing property and casualty insurance to provide the following loss information for the three (3) previous policy years to the first named insured within thirty (30) days of receipt of the first named insured's written request:

(a) On all claims, date and description of occurrence, and total amount of payments; and

(b) For any occurrence not included in Subparagraph (a) of this Paragraph (1), the date and description of occurrence.

(2) Should the first named insured be requested by a prospective insurer to provide detailed loss information in addition to that required under Paragraph (1), the first named insured may mail or deliver a written request to the insurer for the additional information. No prospective insurer shall request more detailed loss information than reasonably required to underwrite the same line or class of insurance.

The insurer shall provide information under this subparagraph to the first named insured as soon as possible, but in no event later than twenty (20) days of receipt of the written request. Notwithstanding any other provision of this section, no insurer shall be required to provide loss reserve information, and no prospective insurer may refuse to insure an applicant solely because the prospective insurer is unable to obtain loss reserve information.

(3) The commissioner may promulgate regulations to exclude the providing of the loss information as outlined in Paragraph (1) for any line or class of insurance where it can be shown that the information is not needed for that line or class of insurance, or where the provision of loss information otherwise is required by law.

Drafting Note: Loss information on workers' compensation is an example in some states of loss information otherwise required by law.

(4) Information provided under Paragraph (2) shall not be subject to discovery by any party other than the insured, the insurer, and the prospective insurer.

Drafting Note: This provision may not be required in states that have a privacy act which governs consumer access to this information. Those states considering applying this requirement to life, accident and health lines of insurance should first review their state privacy act related to issues of confidentiality of individual insured information.

P. Violating any one of Sections [insert applicable sections].

Drafting Note: Insert section numbers of any other sections of the state's insurance laws deemed desirable or necessary to include as an unfair trade practice, such as cancellation and nonrenewal laws.

Section 5. Favored Agent or Insurer; Coercion of Debtors

A. No person may require as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation a creditor is to acquire or finance, negotiate any policy or renewal thereof through a particular insurer or group of insurers or agent or broker or group of agents or brokers.

B. No person who lends money or extends credit may:

(1) Solicit insurance for the protection of real property, after a person indicates interest in securing a first mortgage credit extension, until such person has received a commitment in writing from the lender as to a loan or credit extension;

(2) Unreasonably reject a policy furnished by the borrower for the protection of the property securing the credit or lien. A rejection shall not be deemed unreasonable if it is based on reasonable standards, uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards

shall not discriminate against any particular type of insurer, nor shall such standards call for rejection of a policy because it contains coverage in addition to that required in the credit transaction;

(3) Require that any borrower, mortgagor, purchaser, insurer, broker or agent pay a separate charge, in connection with the handling of any policy required as security for a loan on real estate, or pay a separate charge to substitute the policy of one insurer for that of another. This paragraph does not include the interest that may be charged on premium loans or premium advancements in accordance with the terms of the loan or credit document;

(4) Use or disclose, without the prior written consent of the borrower, mortgagor or purchaser taken at a time other than the making of the loan or extension of credit, information relative to a policy which is required by the credit transaction, for the purpose of replacing such insurance;

(5) Require any procedures or conditions of duly licensed agents, brokers or insurers not customarily required of those agents, brokers or insurers affiliated or in any way connected with the person who lends money or extends credit.

C. Every person who lends money or extends credit and who solicits insurance on real and personal property subject to Subsection B of this section shall explain to the borrower in writing that the insurance related to such credit extension may be purchased from an insurer or agent of the borrower's choice, subject only to the

lender's right to reject a given insurer or agent as provided in Subsection B(2). Compliance with disclosures as to insurance required by truth-in-lending laws or comparable state laws shall be compliance with this subsection.

This requirement for a commitment shall not apply in cases where the premium for the required insurance is to be financed as part of the loan or extension of credit involving personal property transactions.

D. The commissioner shall have the power to examine and investigate those insurance related activities of any person or insurer that the commissioner believes may be in violation of this section. Any affected person may submit to the commissioner a complaint or material pertinent to the enforcement of this section.

E. Nothing herein shall prevent a person who lends money or extends credit from placing insurance on real or personal property in the event the mortgagor, borrower or purchaser has failed to provide required insurance in accordance with the terms of the loan or credit document.

F. Nothing contained in this section shall apply to credit life or credit accident and health insurance.

Section 6. Power of Commissioner

The commissioner shall have power to examine and investigate the affairs of every insurer in this state in order to determine whether such insurer has been or is engaged in any unfair trade practice prohibited by this Act.

Section 7. Hearings, Witnesses, Appearances, Production of Books, and Service of Process

A. Whenever the commissioner shall have reason to believe that any insurer has been engaged or is engaging in this state in any unfair trade practice whether or not defined in this Act, and that a proceeding by the commissioner in respect thereto would be in the interest of the public, the commissioner shall issue and serve upon such insurer a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than [insert number] days after the date of the service thereof.

B. At the time and place fixed for such hearing, the insurer shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring the insurer to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at the hearing by counsel or in person.

C. Nothing contained in this Act shall require the observance at any such hearing of formal rules of pleading or evidence.

D. The commissioner, upon such hearing, may administer oaths, examine and cross examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence or other documents the commissioner deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party shall, cause to be

made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the [insert title] Court of [insert county] County or the county where such person resides, on application of the commissioner, may issue an order requiring such person to comply with the subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

E. Statements of charges, notices, orders and other processes of the commissioner under this Act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order or other process at the person's residence or principal office or place of business. The verified return by the person so serving the statement, notice, order, or other process, setting forth the manner of service, shall be proof of the same, and the return postcard receipt for the statement, notice, order or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

Section 8. Cease and Desist and Penalty Orders

If, after hearing, the commissioner finds that an insurer has engaged in an unfair trade practice, the commissioner shall reduce the findings to writing and shall issue and cause to be served upon the insurer charged with the violation, a copy of the findings in an order requiring the insurer to cease and desist from engaging in the act or practice and the commissioner may, at the commissioner's discretion order:

A. Payment of a monetary penalty of not more than $1,000 for each violation, but not to exceed an aggregate penalty of $100,000, unless the violation was committed flagrantly in a conscious disregard of this Act, in which case the penalty shall not be more than $25,000 for each violation not to exceed an aggregate penalty of $250,000; and/or

B. Suspension or revocation of the insurer's license if the insurer knew or reasonably should have known that it was in violation of this Act.

Section 9. Judicial Review of Orders

A. Any person subject to an order of the commissioner under Section 8 or Section 11 may obtain a review of such order by filing in the [insert title] Court of [insert county] County, within [insert number] days from the date of the service of such order, a written petition praying that the order of the commissioner be set aside. A copy of such petition shall be forthwith served upon the commissioner, and thereupon the commissioner forthwith shall certify and file in such court a transcript of the entire record in the

proceeding, including all the evidence taken and the report and order of the commissioner. Upon filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of the order of the commissioner, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in the transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by [insert type] evidence, shall be conclusive.

Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination.

B. To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify the findings of fact, or make new findings by reason of the additional evidence so taken, and shall file such modified or new findings that are

supported by [insert type] evidence with a recommendation if any, for the modification or setting aside of the original order, with the return of such additional evidence.

Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination. In a state where final judgment, order or decree would not be subject to review by an appellate court provision therefor should be inserted here.

C. An order issued by the commissioner under Section 8 shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the commissioner may thereafter modify or set aside the order to the extent provided in Section 8B; or

(2) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.

D. No order of the commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

Section 10. Judicial Review by Intervenor

If after any hearing under Section 7 or Section 11, the report of the commissioner does not charge a violation of this Act, then any intervenor in the proceedings may

within [insert number] days after the service of such report, cause a petition [notice of appeal] [petition for writ of certiorari] to be filed in the [insert title] Court of [insert county] County for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this Act, and containing penalties pursuant to Section 8.

Drafting Note: The type of procedure should conform to state procedure. See also note to Section 9 concerning review by appellate courts.

Section 11. Penalty for Violation of Cease and Desist Orders

Any insurer which violates a cease and desist order of the commissioner and while such order is in effect, may after notice and hearing and upon order of the commissioner, be subject at the discretion of the commissioner to:

A. A monetary penalty of not more than $25,000 for each and every act or violation not to exceed an aggregate of $250,000 pursuant to any such hearing; and/or

B. Suspension or revocation of the insurer's license.

Section 12. Regulations

The commissioner may, after notice and hearing, promulgate reasonable rules, regulations and orders as are necessary or proper to carry out and effectuate the provisions of this Act. Such regulations shall be subject to review in accordance with Section [insert applicable section].

Drafting Note: Insert section number providing for review of administrative orders.

Section 13. Provisions of Act Additional to Existing Law

The powers vested in the commissioner by this Act shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

Section 14. Immunity From Prosecution

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required may tend to incriminate or subject the person to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, the person shall nonetheless comply with such direction, but shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which the

person may testify or produce evidence thereto, and no testimony so given or evidence produced shall be received against the person upon any criminal action, investigation or proceeding; provided, however, that no such person so testifying shall be exempt from prosecution or punishment for any perjury committed while so testifying and the testimony or evidence so given or produced shall be admissible against the person upon any criminal action, investigation or proceeding concerning such perjury, nor shall the person be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the Insurance Law of this state. Any such person may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such person shall not be entitled to any immunity or privilege on account of any testimony the person may so give or evidence so produced.

Section 15. Separability Provision

If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to person or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Legislative History (all references are to the Proceedings of the NAIC).

1947 Proc. 383, 392-400, 413 (adopted).
1960 Proc. II 485-487, 509-515, 516 (reprinted).
1972 Proc. I 15, 16, 443-444, 491, 493-501 (amended and reprinted).
1977 Proc. I 26, 28, 211, 226-227 (amended).
1979 Proc. II 31, 34, 38, 39-40, 525 (amended).
1985 Proc. I 19, 39, 85-86 (amended).
1989 Proc. II 13, 21, 129-130, 132, 133-140) (amended and reprinted).
1990 Proc. I 6, 25, 122, 146 (changed name of model).
1990 Proc. II 7, 13-14, 160, 169-177 (amended and reprinted).
1991 Proc. I 9, 16, 192-193, 196-203 (amended and reprinted).
1993 Proc. I 8, 136, 242, 246-254 (amended and reprinted).
1993 Proc. 1st Quarter 3, 34, 267, 274, 276 (amended).

UNFAIR TRADE PRACTICES ACT

The date in parentheses is the effective date of the legislation or regulation, with latest amendments. See KEY on last page.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATEDLEGIS./REGS.
Alabama		ALA. CODE §§ 27-12-1 to 27-12-24 (1971).
Alaska	ALASKA STAT. §§ 21.36.010 to 21.36.350 (1976/1992).	ALASKA STAT. 21.36.145 (1992) (Financial planners).
Arizona	ARIZ. REV. STAT. ANN. §§ 20-441 to 20-461 (1954/1982).	
Arkansas	ARK. STAT. ANN. §§ 23-66-201 to 23-66-316 (1959/1995).	
California	CAL. INS. CODE §§ 780 to 790.10 (1959/1989).	*See also* CAL. INS. CODE § 750.1 (1987) (Rebating).
Colorado	COLO. REV. STAT. §§ 10-3-1101 to 10-3-1113 (1963/1987).	
Connecticut	CONN. GEN. STAT. § 38a-815 38a-819 (1955/1995)[1]	

Delaware	DEL. CODE ANN. tit. 18 §§ 2301 to 2314 (1953/1995)[1]	
D.C.	NO ACTION TO DATE	
Florida	FLA. STAT §§ 626.951 to 626.9641 (1982/1995)[1]	*See also* FLA. STAT. § 626.572 (1990) (Rebating).
Georgia	GA. CODE ANN. §§ 33-6-1 to 33-6-14 (1972/1992).	
Guam	NO ACTION TO DATE	
Hawaii	HAWAII REV. STAT. §§ 431:13-101 to 431:13-204 (1988/1989).	
Idaho	IDAHO CODE §§ 41-1301 to 41-1331 (1961/1987).	*See also* Bulletin 88-2 on rebating.
Illinois		215 ILL. COMP. STAT. 5/421 to 5/434 (1959/1984).
Indiana	IND. CODE §§ 27-4-1-1 to 27-4-1-18 (1947/1994).	
Iowa	IOWA CODE §§ 507B.1 to 507B.14 (1955/1982).	

Kansas	KAN. STAT. ANN. §§ 40-2401 to 40-2421 (1955/1992).
Kentucky	KY. REV. STAT. §§ 304.12-010 to 304.12-230 (1970/1988).
Louisiana	LA. REV. STAT. ANN. §§ 22:1211 to 22:1219 (1966/1993).
Maine	ME. REV. STAT. ANN. tit. 24-A §§ 2151 to 2182 (1970/1987) (Some extra provisions).
Maryland	MD. ANN. CODE art. 48A §§ 212 to 234 (1947/1990).
Massachusetts	MASS. GEN. LAWS ch. 176D §§ 1 to 14 (1972).
Michigan	MICH. COMP. LAWS §§ 500.2001 to 2093 (1957/1992) (Some extra provisions).
Minnesota	MINN. STAT. §§ 72A.17 to 72A.32 (1967/1983).

Mississippi	MISS. CODE ANN. §§ 83-5-29 to 83-5-51 (1956).	
Missouri	MO. REV. STAT. §§ 375.930 to 375.948 (1978/1991).	*See also* MO. ADMIN. CODE tit. 20 § 100-2.100 (1990) (Financial planners).
Montana	MONT. CODE ANN. §§ 33-18-101 to 33-18-1005 (1959/1987).	
Nebraska	NEB. REV. STAT. §§ 44-1522 to 44-1535 (1973/1994).	
Nevada	NEV. REV. STAT. §§ 686A.010 to 686A.320 (1971/1987).	
New Hampshire	N.H. REV. STAT. ANN. §§ 417:1 to 417:17 (1947/1985).	
New Jersey	N.J. REV. STAT. §§ 17:29B-1 to 17:29B-14 (1947/1953).	
New Mexico	N.M. STAT. ANN. §§ 59A-16-1 to 59A-16-29 (1985).	
New York	N.Y. INS. LAW §§ 2401 to 2409; 2602 to 2610 (1984).	

North Carolina	N.C. GEN. STAT. §§ 58-63-1 to 58-63-60 (1949/1990).	
North Dakota	N.D. CENT. CODE §§ 26.1-04-01 to 26.1-04-19 (1983/1989).	
Ohio	OHIO REV. CODE ANN. §§ 3901.19 to 3901.22 (1955-1956/1994); OHIO INS. REGS. RULE 3901-1-07 (1975).	
Oklahoma	OKLA. STAT. tit. 36 §§ 1201 to 1228 (1957/1987).	
Oregon		OR. REV. STAT. §§ 746.005 to 746.270 (1967/1989).
Pennsylvania	40 PA. CONS. STAT. §§ 1171.1 to 1171.15 (1974/1984).	
Puerto Rico	P.R. LAWS ANN. tit. 26 §§ 2701 to 2740 (1974/1983).	
Rhode Island	R.I. GEN. LAWS §§ 27-29-1 to 27-29-13 (1958/1993).	

South Carolina	S.C. CODE ANN. §§ 38-57-10 to 38-57-310, 38-59-10 to 38-59-50 (1988); S.C. INS. R. 69-19 (1982).	
South Dakota	S.D. CODIFIED LAWS ANN. §§ 58-33-1 to 58-33-46.1 (1966/1986); §§ 58-33-66 to 58-33-69 (1986/1989).	
Tennessee	TENN. CODE ANN. §§ 56-8-101 to 56-8-118 (1981).	
Texas	TEX. INS. CODE ANN. art. 21.21 and 21.21-2 (1973/1987), 21.21-6 (1995); TEX. ADMIN. CODE § 21.203 (1976/1985).	
Utah		*See*: UTAH INS. DEPT. R590-154 (1993) (Unfair marketing practices).
Vermont	VT. STAT. ANN. tit. 8 §§ 4721 to 4726 (1974).	
Virgin Islands		V.I. CODE ANN. tit. 22 §§ 1201 to 1228 (1968).

Virginia	VA. CODE §§ 38.2-500 to 38.2-516 (1986/1991).	
Washington	WASH. REV. CODE ANN. §§ 48.30.010 to 48.30.270 (1947/1985).	
West Virginia	W.VA. CODE §§ 33-11-1 to 33-11-10 (1957/1985).	
Wisconsin		WIS. STAT. §§ 628.31 to 628.46 (1975/1983); *See also*: WIS. ADMIN. CODE § INS. 6.68 (1979/1984).
Wyoming	WYO. STAT. §§ 26-13-101 to 26-13-124 (1967/1986).	

KEY

[1] Includes specific reference to unfair discrimination against victims of domestic violence.